No. 80-328

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF NEW YORK, PETITIONER

v.

ROGER BELTON

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a warrantless search of an item seized from an area within the potential reach of an arrestee, conducted during the course of the arrest process, is invalid because the item was within the control of the officer at the time of the search.

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INTEREST OF THE UNITED STATES

This case presents an important and frequently recurring question of Fourth Amendment law concerning the permissible scope of search incident to a lawful arrest. Although the particular facts of this case concern a search of a jacket inside an automobile following the arrest of a suspect outside the vehicle, the general question posed here arises in a great variety of situations. The issues presented by this case are of substantial interest to federal law enforcement officers and prosecutors. Several authorities

have noted that searches incident to arrest occur with far greater frequency than searches undertaken pursuant to search warrants.[1] The limits imposed by the Fourth Amendment upon searches of clothing or other items that might contain weapons, contraband, or evidence of crime, when such searches are undertaken in the course of the arrest process, are thus issues of central concern to the administration of criminal justice.

Federal or state officers arresting individuals on probable cause in circumstances analogous to this case often engage in contemporaneous searches of containers that are or were within the potential reach of the arrestee at the time of his arrest. A case in point is *United States* v. *Benson*, 631 F.2d 1336 (8th Cir. 1980), petition for cert. pending, No. 80-1317 (filed Feb. 4, 1981). There, in the course of arresting the defendant as he was seated in the front seat of an automobile, state officers seized from the seat, and immediately searched, a tote bag that the defendant had been reaching for at the time of arrest. The search uncovered a quantity of cocaine, which served as the basis for Benson's convictions on federal drug charges. On appeal, the United States Court of Appeals for the Eighth Circuit held that the cocaine should have been suppressed, concluding that "[o]nce the police officers seized the bag and exercised exclusive control over it" (631 F.2d at 1340) they should have obtained a warrant before conducting the search.[2] Whether the legality of searches such as

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[1] See T. Taylor, *Two Studies in Constitutional Interpretation* 48 (1969); American Law Institute, *A Model Code of Pre-Arraignment Procedure* 493-494 (1975).

[2] We have suggested that consideration of our petition in *Benson* be deferred pending the Court's decision in this case.

those in *Benson* and this case turns on the degree to which the object searched was within the "exclusive control" of the arresting officers, or whether a different standard should govern, is a matter of considerable importance to federal law enforcement activities.

STATEMENT

Following the denial of his motion to suppress evidence, respondent was convicted in the County Court of Ontario County, New York, upon his plea of guilty to attempted possession of a criminal substance—cocaine—in the sixth degree, in violation of N.Y. Penal Law §§ 220.05 (McKinney 1980) and 110.00 (McKinney 1975). He was sentenced to a term of from one and one-half to three years' imprisonment. On respondent's appeal,[3] the Appellate Division, Fourth Department, affirmed respondent's conviction (Pet. App. A-13 to A-18). The New York Court of Appeals reversed and ruled that respondent's motion to suppress should have been granted (Pet. App. A-1 to A-12).

1. The evidence at the suppression hearing showed that on April 9, 1978, a car in which respondent and three companions were riding was stopped for speeding by a New York State trooper (H. Tr. 6-9, 13).[4] The officer approached the car and asked the driver for his driver's license and automobile registration. As the driver produced the requested documents the

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[3] New York provides by statute for appeal by a defendant, following a plea of guilty, from the denial of a motion to suppress evidence claimed to be the fruit of an unlawful search and seizure. N.Y. Crim. Proc. Law §§ 710.20(1) (McKinney 1980) and 710.70(2) (McKinney 1971). See *Lefkowitz* v. *Newsome*, 420 U.S. 283, 285 (1975).

[4] "H. Tr." refers to the first volume of the suppression hearing transcript.

officer detected the odor of marijuana (H. Tr. 9, 12-13). After ordering the occupants out of the vehicle, the officer patted each of them down and directed them to stand at separate points in close proximity to the car (H. Tr. 13-15). The officer then retrieved from the floor of the car an envelope of a type commonly used to sell marijuana (H. Tr. 15-16). When he determined that the envelope contained marijuana, the officer formally placed the four individuals under arrest, searched their persons and searched the interior of the automobile (H. Tr. 17). The officer found a jacket on the rear seat of the vehicle; a search of the pockets of the jacket revealed a quantity of cocaine and an identification card bearing respondent's name (H. Tr. 17-19).

2. The Appellate Division upheld the search of the jacket as incident to respondent's arrest (Pet. App. A-13 to A-18). The court noted that under the Fourth Amendment the police, upon making a lawful arrest, may search the person of the arrestee and the area within the arrestee's control, including "those personal effects of the arrestee that are 'ready to hand' " (*id.* at A-17, quoting from *People* v. *Weintraub*, 35 N.Y.2d 351, 354, 320 N.E.2d 636, 638, 631 N.Y.S.2d 897, 900 (1974)). It concluded that once respondent was lawfully arrested for possession of marijuana, "the officer was justified in searching the immediate area for other contraband" (Pet. App. A-18).

The New York Court of Appeals reversed, two judges dissenting (Pet. App. A-1 to A-12). The majority observed that despite his arrest, respondent retained a legitimate expectation of privacy in the contents of his jacket pockets and that the arrest was not a license for the officer "to engage in a

warrantless search of unlimited temporal and geographic scope" (*id.* at A-8). While acknowledging that upon arrest a suspect's possessions within his immediate control may be promptly searched without a warrant, the majority concluded, in reliance upon language in this Court's opinions in *United States* v. *Chadwick*, 433 U.S. 1, 15 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753, 762 (1979), that once the suspect "is effectively neutralized or the object is within the exclusive control of the police," a warrantless search of the object may no longer be justified under the Fourth Amendment as incident to the arrest (Pet. App. A-7). In the majority's view, "[t]he critical inquiry focuses upon the extent to which the arrestee may gain access to the property rather than the time or space between the arrest and search" (*ibid.*). Because respondent was outside the automobile and under arrest at the time of the search, the majority held that his jacket was "within the exclusive custody and control of the police" and thus could not be searched without a warrant under a search incident to arrest rationale (*id.* at A-8).

The dissenters noted that the lower courts had found that "the jackets were within reach of the four suspects and had not yet been reduced to the exclusive control of the officer" (Pet. App. A-11). Pointing out that this case did not involve "an extended search of a defendant's property after the defendant has been completely subdued and all actual danger has passed" (*ibid.*), the dissenters took issue with the majority's conclusion that, because the suspects were outside the car and had been told that they were under arrest, both their persons and their property had been conclusively reduced to the exclusive control of the officer. "Although one might well wish that all

criminal suspects could so readily be subdued as a matter of law, I cannot agree with a decision that requires a police officer to stake his very life upon the validity of such a questionable presumption" (*id.* at A-12). Because "[t]he situation was still fluid," and because of the potential for danger or for destruction of evidence while the lone officer was in the process of arresting four unknown individuals, the dissenters concluded that the search was proper as incidental to the arrest (*id.* at A-11).

SUMMARY OF ARGUMENT

Under the holding of the New York Court of Appeals in this case, warrantless searches of bags, clothing, or other containers that might hold weapons or evidence of crime violate the Fourth Amendment whenever such containers, although searched during the course of the arrest process and although within the potential reach of the suspect at the time of arrest, are within the "exclusive control" of the searching officer at the time of the search. We believe that this holding represents a substantial and unjustified departure from the traditional understanding of the proper scope of a valid search incident to arrest and will inject undesirable uncertainty into the task of police officers in understanding and applying the search-incident exception. The standard for which we contend turns not upon a case-by-case determination of the degree of actual risk that the arrestee could, at the time of the search, gain access to the container. Rather, the lawfulness of a search sought to be justified as incident to an arrest depends upon whether the search was truly part of the arrest process or was an independent investigatory inquiry. The search is valid if it meets basic spatial

and temporal requirements: the former is satisfied if the item searched was physically located in a place to which the arrestee could potentially have gained access at the time of arrest; the latter is met if the search occurs during the period while the arrest is being consummated and before the situation has so stabilized that it could be said that the arrest was completed.

The "exclusive control" test applied by the court below is unsatisfactory for a number of reasons. At the outset, it must be noted that the test would rule out virtually all searches of bags, jackets, or other potential containers of weapons or evidence, that are portable and can be removed from the person or area of the arrestee. Unlike the arrestee's shirt or trouser pockets, such items are unlikely to be within the simultaneous custody of an officer and a suspect when searched. It will be practical to search them only when they are in the sole possession of the officer, and in most circumstances only when the arrestee has to a considerable extent been subdued. Once the officer has gained sufficient possession of the container and the situation has become sufficiently stable to permit a search, the container will probably be within the "exclusive control" of the police in the sense employed by the court below.

The "exclusive control" test is, in fact, inconsistent with the concept of search incident to arrest as traditionally understood and heretofore applied by this and other courts. For example, in *Draper* v. *United States*, 358 U.S. 307 (1959), having found that Draper had been lawfully arrested, the Court concluded that the ensuing search of the bag he had been carrying at the time of arrest was valid as incident to the arrest. And in *United States* v. *Rob-*

inson, 414 U.S. 218 (1973), the Court upheld the search of a cigarette pack taken from the arrestee's person on the same basis. In both cases it could be said that, by the time of the search, the item was in the "exclusive control" of the searching officer in the same sense as was respondent's jacket in the present case.

It is true that in both *Draper* and *Robinson* the item searched had been seized from the person of the arrestee rather than from a nearby area within his potential reach. But this does not afford a logical basis for distinction; in either situation the concerns about access to weapons or evidence have equal force, and in either situation the searching officer has the same degree of "exclusive control" by the time he undertakes his search.

Nor do the language or holdings of *United States* v. *Chadwick*, 433 U.S. 1 (1977), or *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), justify the Court of Appeals' approach. The searches in those cases were considerably removed either spatially or temporally from the time and place of arrest and were plainly not part of the arrest process.

Finally, we note that the "exclusive control" test of the court below—which turns upon what will often be close and difficult judgments about the degree to which the particular complex of circumstances renders it improbable that the suspect could in fact gain access to the searched container—will be exceedingly difficult for police officers to apply and judges to administer. While there will always be some uncertainty at the margins in ascertaining whether the item searched was within the potential reach of the suspect at the time of arrest or whether the arrest process was still underway by the time of the search,

the Court should adhere to its position in *Robinson* eschewing intricate case-by-case analysis of the specific existence, in the circumstances of a particular case, of the dangers justifying the exception generally.

Applying the correct standard to the search in this case, it becomes evident that it was a proper search incident to arrest. The arrest, although announced by the officer, was still in the process of being completed at the time respondent's jacket was inspected, and the jacket was physically located within the potential reach of respondent at the time he was arrested. Nothing more need be shown to sustain the search.

ARGUMENT

THE FOURTH AMENDMENT PERMITS A POLICE OFFICER TO CONDUCT A WARRANTLESS SEARCH OF A CONTAINER THAT IS WITHIN THE POTENTIAL REACH OF A SUSPECT AT THE TIME OF A LAWFUL ARREST, SO LONG AS THE SEARCH IS SUBSTANTIALLY CONTEMPORANEOUS WITH THE ARREST

The holding of the New York Court of Appeals in this case related specifically to the search of an item of clothing located in the interior of an automobile. But the legal issue here presented—involving the proper scope of the historic exception to the requirement of either a search warrant or probable cause in the case of a search incident to a lawful arrest—extends beyond the particular circumstances of this case and implicates principles of general applicability to searches of many different types of "containers" into which an arrestee might reach to grab weapons or evidence of crime. In formulating the rules governing permissible police conduct in this area, there is

no principled basis for distinguishing between an article of clothing such as a jacket that is either carried or otherwise within reach of a suspect at the time of an arrest, and any other form of container the contents of which might be accessible to the suspect at any point in the course of the arrest process.[5] Accordingly, in treating the search incident to arrest issue presented here, our reference to the generic term "container" is meant to encompass a wide assortment of bags, packages and other similar articles, including clothing, which may be used to store or conceal weapons or evidentiary items.

A. A Search of a Container Seized From an Area Within the Potential Reach of an Arrestee Should Be Upheld as Incident to a Lawful Arrest if the Search is Undertaken as Part of the Arrest Process

The issue in this case is whether under the Fourth Amendment the police may, incident to a lawful arrest, conduct a contemporaneous search of a container that was within the potential reach of the arrestee at the time of arrest. While the validity of the search of a person incident to a lawful arrest "has been regarded as settled from its first enunciation" (*United States* v. *Robinson*, 414 U.S. 218, 224 (1973)), the search of an arrestee's surrounding area "has been subject to differing interpretations as to the extent of the area which may be searched" (*ibid.*). After a series of inconsistent holdings, the Court concluded in *Chimel* v. *California*, 395 U.S. 752 (1969), that a warrantless search incident to an

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[5] Clothing that is actually being worn by the arrestee may be subject to different rules, in part at least because it is not feasible to remove the arrestee's clothing until some time after the arrest process has been completed. See *United States* v. *Edwards*, 415 U.S. 800, 805 (1974).

arrest is reasonable only if it is confined to "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763. The Court has also held that the search incident to arrest rationale does not apply to searches that are remote in time or place from the arrest. *Preston* v. *United States*, 376 U.S. 364, 367-368 (1964).

In reaching the conclusion that the search of respondent's jacket could not be justified as incident to his arrest, the majority below did not rely on a finding that the jacket was outside the potential reach of respondent and his companions, or that the search was removed in time or place from the arrest. Instead, the majority appears to have concluded that once respondent and his companions had been removed from the car and placed under arrest there was no longer any realistic danger that they would attempt to grab any weapons or evidence from containers inside the car (see Pet. App. A-8 to A-9).[6] In contrast, the dissenters stressed the dangers inherent in the confrontation between the lone arresting officer and four unknown suspects (*id.* at A-11 to A-12).

While there is much force to the dissenters' observations, in our view the permissibility of a search under the traditional search incident to arrest excep-

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[6] See also *United States* v. *Benson*, 631 F.2d 1336 (8th Cir. 1980), petition for cert. pending, No. 80-1317 (filed Feb. 4, 1981), where the court concluded that a prompt search of a tote bag for which the defendant was reaching at the time of his arrest could not be upheld as incident to the arrest because once the officer seized the bag "there was no longer any danger that [the defendant] might gain access to the bag to destroy evidence or grab a weapon." *Id.* at 1340.

tion does not turn upon a case-by-case assessment of the degree of actual risk that the arrestee could, at the time of the search, gain access to the container. Instead, the lawfulness of a search sought to be justified as incident to an arrest depends on whether, when viewed objectively (see *Scott* v. *United States*, 436 U.S. 128, 135-138 (1978); *United States* v. *Robinson*, *supra*, 414 U.S. at 236), the search can truly be said to have been undertaken as part of the arrest process rather than as a separate investigative inquiry after the arrest has been completed. In determining whether or not a search was part of the arrest process, the inquiry should focus on factors concerning the spatial and temporal proximity of the search to the arrest.

We submit that it is reasonable under the Fourth Amendment to permit the police, when a lawful arrest has occurred, to conduct a warrantless search of a container at the place of arrest if the search is substantially contemporaneous with the arrest and is confined to those containers within the arrestee's potential reach at the time of his arrest. See *United States* v. *Garcia*, 605 F.2d 349, 353 (7th Cir. 1979), cert. denied, 446 U.S. 984 (1980). The latter requirement, that the search be confined to containers to which the arrestee might again access at the time of his arrest, derives from the "immediate control" standard established in *Chimel* v. *California*, *supra*. The Court in *Chimel* explained the basis for this standard (395 U.S. at 762-763):

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable

> for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

As the discussion in *Chimel* makes clear, searches of both the arrestee's person and of the area within his immediate control are justified by the same reasons, since the same danger exists that the suspect may reach for a weapon or destructible evidence concealed in the nearby area as for items on his person.

By confining the areas that may be searched to those within the potential reach of the suspect, *Chimel* establishes relatively clear outer limits beyond which the police may not engage in warrantless searches on the basis of a search incident to arrest rationale. Thus, the Court emphasized that the search incident to arrest exception provides no justification "for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant." 395 U.S. at 763 (footnote omitted). Under the *Chimel* rule, therefore, locked closets or other areas that technically may be within reach of the

arrestee but whose contents are inaccessible to him may not be searched—absent a warrant, consent, or exigent circumstances.

The requirement that the search be "substantially contemporaneous" with the arrest is one that has been expressed in numerous decisions of this Court. See, *e.g.*, *Vale* v. *Louisiana*, 399 U.S. 30, 33 (1970); *Shipley* v. *California*, 395 U.S. 818, 819 (1969); *James* v. *Louisiana*, 382 U.S. 36, 37 (1965); *Stoner* v. *California*, 376 U.S. 483, 486 (1964); *Preston* v. *United States*, *supra*, 376 U.S. at 367; *Agnello* v. *United States*, 269 U.S. 20, 30 (1925). This requirement is satisfied if the search occurs during the period in which the arrest is being consummated and before the situation has so stabilized that it could be said that the arrest was completed. For example, after the arrestee has been placed in a patrol car and driven away from the scene of the arrest, a search of a container seized from the arrestee would not qualify as incident to the arrest even if the container had been within the arrestee's potential reach at the time of arrest. While the precise boundaries of the "substantially contemporaneous" standard remain to be fleshed out, this requirement places law enforcement officers on notice that a search of a container within reach of the arrestee must be undertaken promptly in the course of completing the arrest in order to be justified as incident to arrest.

In light of these principles, it follows that contemporaneous searches of unlocked containers within the "immediate control" of an arrestee are permissible under the search incident to arrest doctrine. Containers such as gym bags, briefcases, or the pockets of a jacket certainly are places into which an arrestee might have placed weapons or evidence upon the ap-

proach of police officers and might reach to seize a weapon and conceal or destroy evidence.

The "immediate control" and "substantially contemporaneous" requirements are readily understandable and should afford law enforcement officers a sufficient basis to make an on-the-scene assessment whether a particular container may be searched as an incident of an arrest. Adherence by the police to these requirements will ensure that searches incident to arrest will be undertaken only as part of the arrest process itself, rather than as an entirely separate investigatory undertaking.

B. The "Exclusive Control" Test Applied by the New York Court of Appeals is an Unsatisfactory Standard for Determining the Applicability of the Search Incident Exception to a Search That is Conducted as Part of the Arrest Process

Although the court below did not expressly question the validity of the search incident to arrest doctrine, its holding raises serious questions concerning the continuing applicability of that doctrine to searches of bags, clothing, and other types of containers at the time and place of arrest, even where the container is within the potential reach of the suspect at the moment of arrest. In the view of the Court of Appeals, law enforcement officers may not undertake a search of a container incident to a lawful arrest once they have gained "exclusive control" (Pet. App. A-7) over the container. If the court below is correct, few, if any, searches of containers could be justified as incident to arrest. Unless the police make a point of holding the container in question within reach of the suspect as they open it, the container will almost always be under the "exclusive

control" of the police, in the sense the concept seems to have been employed here, at the time of the search. Thus, the decision below, if upheld, would severely limit, if not effectively abolish, the search incident to arrest exception with respect to searches of movable items that are capable of being reduced to exclusive police custody.

The "exclusive control" test, as employed by the court below, is fundamentally inconsistent with traditional principles governing searches incident to a lawful arrest as reflected in the decisions of this Court. For example, in *United States* v. *Robinson, supra,* a District of Columbia police officer stopped an automobile, ordered the occupants out of the car and arrested the driver for operating a motor vehicle after the revocation of his operator's permit. In the course of searching the defendant's person incident to his arrest the officer removed a crumpled package of cigarettes from the defendant's coat pocket. The officer discovered that it contained heroin capsules. Rejecting the conclusion of the dissenting Justices that once the officer took possession of the package it was no longer possible for the defendant to gain access to a weapon and that therefore the search of the package could not be upheld as incident to the arrest (414 U.S. at 255-259), the Court upheld the inspection of the package as part of a valid search incident to a lawful arrest. *Id.* at 236. See also *Gustafson* v. *Florida,* 414 U.S. 260, 266 (1973) (search of cigarette box upheld as incident to arrest); *Adams* v. *Williams,* 407 U.S. 143, 149 (1972) (automobile search upheld as incident to arrest). Similarly, in *Draper* v. *United States,* 358 U.S. 307 (1959), after finding that Draper had been lawfully arrested on probable cause, the Court upheld, as incident to the

arrest, the search of a zipper bag that Draper had been carrying at the time of arrest.

Although *Robinson* and *Draper* involved the search of a container seized from the person of the arrestee, the Court's conclusion in both cases that the officer could search the container after taking possession of it applies with equal force to contemporaneous searches of containers that are within the potential reach of a suspect at the time of arrest. There is no rational ground for differentiating between searches of cigarette packages, purses, or similar items seized from the person of the arrestee and like containers seized from the arrestee's immediate vicinity. Thus, for purposes of the search incident to arrest doctrine, it is of no constitutional significance whether at the moment of arrest the person is actually carrying a jacket or bag or has set it down next to him on a bench or on the seat of a car.[7] In either case, as *Chimel* teaches, the concerns about access to weapons or evidence during the arrest process are of equal magnitude. And in either situation, regardless of the container's original location, once the officer undertakes his search, the container presumably is within his "exclusive control" and is no longer accessible to the arrestee.

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[7] Most lower courts have upheld contemporaneous searches of such containers whether or not they were in the physical possession of the suspect at the time of arrest. See, *e.g.*, *United States* v. *Graham*, No. 80-1206 (7th Cir. Jan. 27, 1981); *United States* v. *Garcia*, *supra*; *United States* v. *Dixon*, 558 F.2d 919 (9th Cir. 1977), cert. denied, 434 U.S. 1063 (1978); *Dawson* v. *State*, 40 Md. App. 640, 395 A.2d 160 (1978); *State* v. *Brasel*, 538 S.W.2d 325 (Mo. 1976); *State* v. *LaBlanc*, 347 A.2d 590 (Me. 1975); *State* v. *Bracco*, 15 Or. App. 672, 517 P.2d 335 (1973).

This Court's decisions in *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), did not adopt the position, rejected in *Robinson*, that contemporaneous searches of containers seized from the person or the immediate area of the arrestee may not be undertaken as incident to a lawful arrest. Although the Court in both cases stated that a warrant was required once the police gain "exclusive control" over luggage,[8] neither case presented the question whether a prompt search of a container within the immediate control of an arrestee at the time of arrest could be upheld under the traditional search incident to arrest exception. Thus, the statements in both cases are dicta insofar as they may be construed (contrary to their apparent intent) as applying to traditional searches incident to arrest.

The search in *Chadwick* was remote both in time and place from the arrest, and hence could not, under settled principles (see *Preston* v. *United States*, *supra*), have been upheld as incident to arrest.[9] Furthermore, *Chadwick* reaffirmed the principle es-

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[8] In *Chadwick*, the Court observed that "[o]nce law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." 433 U.S. at 15 (footnote omitted). In *Sanders*, the Court noted that a warrant was required to search a suitcase where "the officers had seized the luggage and had it exclusively within their control at the time of the search." 442 U.S. at 762.

[9] Indeed, the government did not argue in *Chadwick* that the warrantless search of the footlocker at the federal building approximately 90 minutes after the defendants' arrest was

tablished in *Robinson* that a traditional search incident to arrest may be conducted "whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence. The potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved." 433 U.S. at 14-15.

In *Sanders*, the Court expressly declined to consider whether the search at issue could be justified as incident to the arrest, noting that the State had not made that argument and that it appeared that the suitcase, which was in the trunk of a taxi in which the defendant had been riding, was in any event not within his "immediate control." 442 U.S. at 764 n.11. *Sanders* demonstrates quite convincingly that the Court's reference to "exclusive control" in *Chadwick* did not mean to foreclose prompt searches of containers incident to arrest. If *Chadwick* had in fact ruled out such searches, it would have been unnecessary for the Court in *Sanders* to explain why it was not addressing the search incident theory; instead, the

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permissible as a traditional search incident to arrest. Instead, the government urged that "the Constitution permits the warrantless search of any property in the possession of a person arrested in public, so long as there is probable cause to believe that the property contains contraband or evidence of crime." 433 U.S. at 14. See Brief for the United States (No. 75-1721, 1976 Term) at 49-57. Moreover, the container in *Chadwick* was a double-locked footlocker that was not readily accessible at the time of arrest and that accordingly would not likely have been subject to a search incident to arrest even if the search had been undertaken contemporaneously with the arrest.

Court simply could have stated that any such argument did not survive *Chadwick*.

Nor did *Chadwick* and *Sanders* establish that certain containers may never be searched incident to arrest because of an arrestee's heightened privacy interest in their contents. The decision below appears to rest in part on the premise that the arrest of respondent did not vitiate his privacy interest in the contents of his jacket pockets (see Pet. App. A-8). But the fact that an arrestee may ordinarily have a legitimate expectation of privacy in the contents of containers within his possession and control at the time of arrest is irrelevant in determining the validity of a search incident to a lawful arrest.[10] While a purse or the pockets of a jacket are "respositor[ies] of personal effects" (*United States* v. *Chadwick*, *supra*, 433 U.S. at 13; *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762), that fact does not make it less likely that a weapon or evidence of crime may be concealed inside. In *Chimel*, the Court concluded that when an arrest takes place inside private premises, it is permissible for the police to search "a drawer in front of one who is arrested." 395 U.S. at 763. An arrested suspect unquestionably has at least as legitimate an expectation of privacy in the contents of drawers inside his home as he has in the contents of containers he carries outside the house. Indeed, even the majority below recognized that "[u]pon

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[10] A somewhat different question is presented as to the propriety of warrantless searches of certain types of containers, such as paper bags or plastic trash bags, that by their nature may enjoy reduced privacy protections. Quite apart from any arrest, warrantless searches of such containers may be lawful if supported by probable cause. Such an issue is before this Court in *Robbins* v. *California*, cert. granted, No. 80-148 (Jan. 19, 1981).

arrest, the privacy interest of the arrestee in possessions within the arrestee's immediate control [is] subsumed within the State's interest in discovering weapons, thwarting access to means of escape and preventing the destruction of evidence * * *" (Pet. App. A-7). Thus, as a general matter, searches of containers may be undertaken as incident to a lawful arrest regardless of the fact that the arrestee otherwise enjoys a privacy interest in their contents.

To be sure, as the Court observed in *Chadwick*, if the search of a container is " 'remote in time or place from the arrest' " (433 U.S. at 15, quoting from *Preston* v. *United States*, *supra*, 376 U.S. at 367), it cannot be justified as incident to that arrest.[11] Thus, we agree that after the arrest process has been completed, privacy considerations again become relevant and in such a situation the police may not, absent a warrant, conduct an investigative search of a container in which the arrestee has a legitimate expectation of privacy unless the arrestee consents to the search or exigent circumstances are present.

We submit that when applied to searches contemporaneous with an arrest, the "exclusive control" test of the court below is an impractical standard that will be difficult for the courts to administer and the police to observe, because what constitutes "exclusive control" may vary depending upon subtle differences in the factual situation of each particular case. This Court in *Robinson* expressly rejected the "suggestion that

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[11] A routine inventory of the contents of an automobile may be taken at a time and place removed from the arrest. *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). This may also be true of clothing, bags, or other containers seized from a suspect at the time of his arrest. See *United States* v. *Chadwick*, *supra*, 433 U.S. at 21 (Blackmun, J., dissenting). This issue, however, is not presented here.

there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." 414 U.S. at 235. As the Court explained (*ibid.*):

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Because it is the fact of custodial arrest that gives rise to the authority to search, the Court in *Robinson* concluded that searches incident to arrest are permissible without regard to whether the arresting officer had a subjective fear that he was in danger when making the arrest. 414 U.S. at 236.

In light of this Court's analysis in *Robinson*, we submit that the permissibility of a search of a container at the time and place of arrest should not turn on whether the police have "exclusive custody" of the container or have "neutralized" or subdued the suspect at the time of the search. Whether a container is within the "exclusive control" of the police or whether the suspect has been sufficiently "neutralized" will often require a careful weighing of the minute factual shadings of each case. For example, if, as in this case, an arrestee is outside a vehicle in which a container is located, is the container within the "exclusive control" of the officer, and is the arrestee sufficiently "neutralized" so as to bar a search of the container incident to arrest? If one officer is in the process of searching the person of the arrestee while another officer is searching a container, is the latter search impermissible without a warrant? See *United States* v. *Benson*, *supra*. If the container and the arrestee are moved for legitimate reasons a short distance away from the spot at which the arrest has taken place, can a prompt search of the container be undertaken? See *United States* v. *Garcia*, *supra*. If the police have handcuffed the suspect but have not yet removed him from the vicinity of the container, is the possibility that the arrestee might still reach into the container for a weapon or evidence so remote that a search of the container will not be upheld as incident to the arrest? See *United States* v. *Neumann*, 585 F.2d 355, 359-360 (8th Cir. 1978); *United States* v. *Jones*, 475 F.2d 723, 727-728 (5th Cir.), cert. denied, 414 U.S. 841 (1973); *United States* v. *Ciotti*, 469 F.2d 1204, 1206-1207 (3d Cir. 1972), vacated on other grounds, 414 U.S. 1151 (1974).

As these examples illustrate, resolution of the permissibility of a search under the "exclusive control"

and "neutralization" standards employed by the court below may turn on hairline distinctions between the circumstances of different cases. These standards provide little or no practical guidance to the officers on the scene as to what they may or may not do. Moreover, these impractical standards are not compelled by the policies that the Fourth Amendment is meant to serve. The touchstone of the Fourth Amendment is reasonableness. Because the fact of a lawful arrest provides the authority to search a suspect as well as the area within his "immediate control," a properly limited search of a nearby container incident to arrest is "reasonable" under the Fourth Amendment. See *United States* v. *Robinson*, *supra*, 414 U.S. at 235.

The need for clear rules in this area is manifest. To begin with, "[a] search incident to arrest is by far the most common variety of police search practice, and it occurs under an infinite variety of circumstances." LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 143 (footnote omitted). Moreover, the decision whether, in a particular arrest situation, it is necessary to search a nearby container is a difficult one that would require the officer to speculate about the likelihood that the arrestee might have evidence or a weapon concealed inside the container and the possibility that the arrestee might attempt to reach into the container to grab such items. In contrast to the decision whether to procure a warrant to search a dwelling, where there is ordinarily an opportunity for the officers to marshal and weigh the appropriate facts, the difficult decision to search a container within reach of an arrestee must be made by the officer on the scene

in the midst of a dangerous, fast-moving, unpredictable situation. Finally, the authority to search incident to arrest is not unrestrained, but rather is limited to the period immediately before and after the arrest and to containers within reach of a person whom the police have probable cause to believe has committed a crime.[12] In these circumstances, "[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'" LaFave, *supra*, 1974 Sup. Ct. Rev. at 141 (footnote omitted), quoting from *United States* v. *Robinson*, 471 F.2d 1082, 1122 (D.C. Cir. 1972) (Wilkey, J., dissenting), rev'd, 414 U.S. 218 (1973). See *United States* v. *Chadwick*, *supra*, 433 U.S. at 22 n.3 (Blackmun, J., dissenting).[13]

This is not to say that the facts of a particular case are irrelevant in determining whether a search may be justified as incident to a lawful arrest. But it is our submission that the protections the Fourth Amendment affords to people "can only be realized if the police are acting under a set of rules which, in

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[12] A properly limited search may be upheld as incident to arrest even if it precedes the formal arrest, so long as the arrest immediately follows the search and the police had probable cause to arrest at the time of the search. *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980), slip op. 12.

[13] Cf. *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979) (footnote omitted): "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."

most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." LaFave, *supra*, 1974 Sup. Ct. Rev. at 142. See also E. Griswold, *Search and Seizure—A Dilemma of the Supreme Court* 47-49 (1975); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 375 (1974). In order to ensure that the police will be capable of both understanding the rules and applying them in practice, we submit that it is important to limit to a minimum the variables that must be weighed in assessing the lawfulness of police actions in this area. Thus, we believe that it should be irrelevant whether, as in this case, there is one arresting officer and four suspects or four arresting officers and one suspect (see *United States* v. *Benson*, *supra*). Nor should such factors as the place where the arrest occurs (*e.g.*, inside a house, at an airport, outside an automobile), the nature of the container (*e.g.*, briefcase, purse, jacket pocket), and whether or not the suspect was holding or reaching for the container at the moment of arrest ordinarily make a difference in the constitutional analysis. The only realistic standard in this context is the one that we have articulated above, which focuses on whether or not the search was undertaken as part of the arrest process.

Applying the correct standard to the facts of this case, it is clear that the search of respondent's jacket was substantially contemporaneous to the arrests of respondent and the other occupants of the car. Furthermore, at the time of their arrests, respondent and his companions were "in close proximity" to the vehicle (H. Tr. 15). The Appellate Division accordingly concluded (Pet. App. A-18) that respondent's jacket

was within the "immediate area" of the arrestees at the time of arrest. In holding that the search could not be justified as incident to arrest the Court of Appeals specifically refused to consider what we submit are the critical factors of "the time or space between the arrest and search" (*id.* at A-7), but rather based its decision on the ground that, because respondent and the other suspects were formally under arrest outside the car, the jacket was in the "exclusive control" of the officer at the time of the search (*id.* at A-8). As we have shown, however, the "exclusive control" test is an inadequate standard for determining the propriety of a search of a container incident to arrest. The court below therefore erred in relying on that standard to suppress the fruits of the search.

CONCLUSION

The judgment of the New York Court of Appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

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